BEFORE THE APPEALS BOARD FOR THE KANSAS DIVISION OF WORKERS COMPENSATION

JIMMY LEE KING)
Claimant)
VS.)
) Docket No. 1,002,354
APAC CUSTOMER SERVICES)
Respondent)
AND)
)
TRAVELERS INSURANCE COMPANY)
Insurance Carrier)

ORDER

Respondent appeals the April 16, 2002 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes. Claimant was granted benefits over respondent's objection that claimant failed to prove that he suffered accidental injury arising out of and in the course of his employment.

ISSUES

Did claimant suffer accidental injury arising out of and in the course of his employment on the dates alleged?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be affirmed.

Claimant is a telephone solicitor for respondent and has been working in that capacity for approximately six years. His job requires that he make 150 to 200 telephone calls per day. While making the phone calls, he utilizes the computer to correct or enter data into the record. The testimony of claimant indicated that he was required to use the keyboard for several entries per telephone call. While those entries may be as uninvolved as a single key touch, it does necessarily involve the use of the computer several times per

telephone call. Claimant's supervisor, Schoen Paschka (the central business manager), acknowledged that 150 to 200 phone calls per day was a realistic workload for claimant.

Claimant began noticing hand problems in May of 2001. At first, the problems were more connected to his right arm than his left, but his symptoms did become bilateral by January of 2002. He was referred first to his family doctor, Joseph G. Schlageck, M.D., who diagnosed either tendonitis or possible carpal tunnel syndrome. Claimant was then referred to Prince Chan, M.D., of the Kansas Orthopaedic Center in Wichita, Kansas. Dr. Chan diagnosed bilateral carpal tunnel syndrome and recommended several treatment options, including bilateral cock-up splints, injections and possibly surgery. Dr. Chan noted claimant's history to include symptoms as a result of using a keyboard on a regular basis at his employment.

Claimant denied any other hand-intensive activities.

The Administrative Law Judge awarded claimant benefits, including ongoing treatment with Dr. Chan and temporary total disability compensation if taken off work.

Respondent contends claimant did not prove that he suffered accidental injury arising out of and in the course of his employment, as the testimony of Ms. Paschka indicated claimant's actual computer keyboard contact was, at most, minimal. She also testified that claimant rarely ever used his left hand. Ms. Paschka acknowledged she rarely worked claimant's job. At the time of her testimony, she had worked claimant's job for approximately two hours the previous October and could not recall before that the last time she actually worked this job. Ms. Paschka acknowledged that claimant was in a better position to understand the physical requirements of his job than she.

In workers' compensation litigation, the burden of proof is on claimant to establish his right to an award of compensation by proving all the various conditions upon which that right depends. This must be established by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g); see also Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to the particular case. <u>Messenger v. Sage Drilling Co.</u>, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

In order for a claimant to collect workers' compensation benefits, he must suffer an accidental injury arising both out of and in the course of his employment. See K.S.A. 44-501.

The phrase "out of employment" points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An

injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred and means the injury happened while the worker was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

It is the function of the trier of fact to decide which testimony is more credible and accurate and to the adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Board finds in this instance the testimony of claimant to be more credible regarding the physical requirements of his job. While Ms. Paschka attempted to discredit claimant's description of his job duties, she was forced to acknowledge that her actual performance of claimant's job was very limited and claimant would be much more able to describe how often he actually uses a keyboard than she.

The Board finds, based upon the evidence presented, that claimant has proven for preliminary hearing purposes that he suffered accidental injury arising out of and in the course of his employment with respondent and the preliminary hearing Order of the Administrative Law Judge granting claimant benefits should, therefore, be affirmed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated April 16, 2002, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this day of May 2002.

BOARD MEMBER

c: Brian D. Pistotnik, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director